

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS**

BUREAU OF SPECIAL EDUCATION APPEALS

**In Re: Student v. Agawam Public Schools
& Melmark-New England**

BSEA #1504488

RULING ON PARENTS' MOTION TO ENFORCE "STAY PUT"

The instant case involves a publicly-funded student (Student) enrolled in a private residential special education school pursuant to a BSEA decision issued in January 2014. The private school, Melmark New England (Melmark or MNE) seeks to terminate Student's placement based on allegations that Parents have failed to abide by MNE policies regarding home visits for Student. MNE states that Parents had agreed to abide by these policies, which are an integral part of MNE's program, as conditions of Student's enrollment. Parents object to the termination. They have filed a hearing request in which they allege that the policies at issue as applied to Student, as well as the planned termination, violate the Student's right to a free, appropriate public education (FAPE).

With the instant *Motion for a Stay Put Order*, Parents seek a ruling from the BSEA designating MNE as Student's placement pending appeal. Parents also filed a *Motion to Enjoin MNE from Terminating Student's Enrollment*. Both *Motions* will be addressed in a single *Ruling*.

SUMMARY OF BACKGROUND AND PROCEDURAL HISTORY

The instant case arises from Parents' second hearing request. Parents filed the first request in 2013 (Case No. 1403554). In that case, Parents sought an order directing the Agawam Public Schools (Agawam or School) to fund a residential educational placement for Student. On January 16, 2014, after an evidentiary hearing, BSEA Hearing Officer William Crane issued a decision (hereafter, "*Decision*") concluding that the Student needs a residential educational program in order to receive a free appropriate public education (FAPE). The Hearing Officer ordered the Agawam Public Schools (Agawam or School) to apply for Student's admission to two such residential schools, New England Center for Children (NECC) and Melmark-New England (MNE). The Hearing Officer further ordered Agawam to convene a Team to identify additional potential residential placements if neither MNE nor NECC accepted Student. Melmark did accept Student, who began attending on or about April 8, 2014.

Beginning in approximately May 2014, conflicts arose between the Parents and MNE regarding such matters as planning for Student's home visits, Parents' attendance at planning meetings and Parents' compliance with MNE's schedule for on-campus visits with Student. In sum, MNE concluded that Parents were failing to cooperate with MNE

protocols designed to begin planning for the Student's visits to his home, as well as for Student's eventual return to his home at some point in the future. Parents, on the other hand, contended that MNE was attempting to unilaterally impose a visitation plan which was less flexible than MNE had represented before Student enrolled, and which did not adequately consider the safety concerns that had precipitated Student's need for residential placement.

In June 2014, concerned that Parents' alleged conduct would jeopardize Student's MNE placement, Agawam filed a *Motion for Compliance* with the *Decision* in BSEA No. 1403554, seeking a BSEA order directing Parents to cooperate with MNE. Oral argument on this *Motion* took place on November 17, 2014, after numerous exchanges of documents and several telephone conference calls. Subsequently, the parties reached an agreement providing that Parents would hold Agawam harmless for any alleged failure to comply with the *Decision* in BSEA No. 1403554, Agawam would withdraw the *Motion for Compliance*, and Parents reserved the right to file a second hearing request in the event that MNE proceeded to a "planned termination" of Student's MNE placement.

On December 19, 2014 Parents filed the above-numbered hearing request together with the instant *Motion to Enforce Stay Put*. On or about January 14, 2015 Parents filed a *Motion to Enjoin MNE from Terminating Student's Placement*. MNE and Agawam filed objections to Parents' *Motions*, and Parents filed responses to those objections. All parties filed voluminous documentary exhibits. A hearing on the Parents' *Motions* was held on January 5 and February 25, 2015.¹ Telephonic oral closing arguments were heard on March 2, 2015.

Those present for all or part of the proceeding were:

Student's father	
Rita Gardner	Executive Director, MNE
Frank Bird	Chief Clinical Officer, MNE
Helena Maguire	Senior Director of School Services, MNE
Kimberly Duhanyan	Director of Residential Services, MNE
James Luiselli	Behavioral Psychologist, Consultant to MNE
Frank Robbins	Psychologist, Parents' Consultant (by speaker phone)
April Rist	Director, Special Services, Agawam Public Schools
Kimberly Cass	Supervisor, Special Services, Agawam Public Schools
Matthew Engel, Esq.	Attorney for Parents
Peter L. Smith, Esq.	Attorney for Agawam Public Schools
William Hunt, Esq.	Attorney for MNE
Sara Berman, Esq.	Hearing Officer, BSEA
Elizabeth Zaharides	Court Reporter

¹ The second day of hearing was postponed several times to accommodate schedules of witnesses and because of severe snowstorms in January and February 2015.

ISSUES PRESENTED

Must Student be maintained in MNE to satisfy the “stay put” requirement of the special education statutes, or may this requirement be fulfilled by Student's placement in a comparable residential educational program?

POSITION OF PARENTS

Student's “stay put” placement is MNE. The *Decision* which ordered Student's original placement made clear that appropriate residential placements for Student are MNE or NECC, and NECC is not currently available for Student. None of the other residential placements considered by Agawam and/or Parents are comparable to MNE and, therefore, do not meet the “stay put” criteria.

Parents have partially rejected the portion of Student's IEP that mandates home visits because they believe that Student's disability-related behavior renders such visits unsafe for him. Parents' disagreement with this portion of Student's IEP implicates FAPE. If Student were enrolled in a public school, he would be entitled to “stay put” protection while Parents and the public school resolved such a dispute. Student does not lose his right to maintenance of his current placement during a FAPE dispute simply because he is a publicly-funded student at an approved private school. To allow MNE to terminate Student under these circumstances would have a chilling effect on parents of such students who may disagree with a portion of their children's IEPs.

Moreover, Parents state that equitable considerations require MNE to be designated as Student's “stay put” placement. Student is doing well in the MNE placement, which is appropriate for him. MNE should not be allowed to unilaterally terminate an otherwise appropriate placement because of a dispute with Parents over whether the home visitation component of the MNE program must be modified in order to provide Student with FAPE. In any event, Parents dispute MNE's allegations that they have violated MNE policies; for example, a parent training session and home visit were scheduled and subsequently cancelled by MNE.

According to Parents, Student would be irreparably harmed if MNE is not designated his “stay put” placement because he would have to move to a program that will not be as appropriate for him and would not return to MNE. Parents further argued that deciding the “stay put” issue in this manner would render the Parents' FAPE dispute moot and foreclose any further relief. On the other hand, Parents argued, that MNE will not be prejudiced by maintaining Student at MNE until the conclusion of the underlying due process proceeding.

POSITION OF MNE

MNE argues that state regulations authorize DESE-approved private special education schools such as MNE to conduct “planned terminations” of publicly-funded

students in appropriate circumstances, provided that the private school and sending public school district follow the procedures set forth in those regulations. The BSEA does not have the authority to compel a private school to retain a student whose placement it seeks to terminate because the placement is no longer appropriate for the student. The BSEA's only role in such a situation is to ensure that the regulatory planned termination process is followed and the student's public school district obtains a successor placement for the child. In the instant case, both MNE and Agawam followed the requisite procedures.

Further, MNE is not the sole facility that can satisfy “stay put” requirements for Student. There are several approved residential schools in Massachusetts that would provide services comparable to those provided by MNE. Student is one of the higher-functioning students enrolled at MNE; his needs are not so unusual or difficult to meet that only MNE can address them appropriately.

Finally, MNE asserts that the BSEA cannot “enjoin” MNE from terminating Student's placement. Even if the BSEA did have such authority, MNE contends that Student does not meet the criteria for injunctive relief because he is not likely to succeed on the merits of his underlying claim. Specifically, Student's claim that MNE's policy of gradual, individually-planned, supported re-integration of its students into their homes and communities is inappropriate for Student or would jeopardize his safety lacks factual support. Indeed, Parents agreed to these terms prior to Student's enrollment at MNE and only disputed them once Student had already begun attending MNE.

POSITION OF AGAWAM PUBLIC SCHOOLS

Agawam agrees with MNE that Parents do not have the right to “stay put” at a private school such as MNE where, as here, they have consistently failed to abide by MNE policies that are conditions of Student's continued enrollment and to which they agreed prior to Student's placement. Agawam is concerned that any ruling requiring a private school to retain students whose parents violate the school's policies will deter such schools from accepting publicly-funded students.

Further, Agawam asserts that the 2014 *Decision* in this matter ordered Agawam to place Student residentially at MNE or NECC if openings were available in either of those two programs. If not, the *Decision* ordered Agawam to refer Student to comparable residential educational programs designed to meet the needs of children with similar profiles to Student. Student's “stay put” rights are to such a comparable program. At all relevant times, Agawam has attempted to effectuate such a placement, but its efforts have consistently been undermined by Parents' actions.

SUMMARY OF EVIDENCE

For purposes of this *Ruling* only, the following factual statements are assumed to be true. All parties have submitted multiple affidavits, copies of correspondence, emails, and similar documents purporting to shed light on the motivations, good or bad faith,

flexibility or inflexibility or the like of parties and individuals. These matters are irrelevant for purposes of this ruling, where the sole issues are (1) whether “stay put” requires Student to stay at MNE or whether a comparable program will suffice and is available and (2) whether the BSEA has the authority to prohibit MNE from terminating Student.

1. The entire *Decision* issued in Case No. 1403554 is incorporated by reference in this *Ruling*.
2. Student is a twelve-year-old boy who has multiple disabilities including Autism Spectrum Disorder (ASD). Student's disabilities impair all areas of his functioning, including his ability to learn, communicate, care for himself, and protect himself in an age-appropriate manner. Student is essentially non-verbal. While living in Parents' home, he engaged in dangerous behavior such as leaving the house and bolting from Parents, as well as engaging in pica.² There is no dispute at this time that Student requires a residential educational placement to provide him with FAPE by, among other things, teaching him skills to behave safely both within and outside of the school setting.
3. There also is no dispute that Student's education should be based on principles of Applied Behavioral Analysis (ABA), such that his instruction in all areas—including academics, adaptive and self-help skills, communication, and behavior—is highly individualized and data-driven.
4. Student began attending MNE as a residential student on or about April 8, 2014. During the months prior to his enrollment Parents and MNE staff attended numerous meetings to discuss Student's transition to MNE. Parents and MNE executed multiple documents purporting to outline the terms and conditions of Student's enrollment. The relevant conditions in this case are MNE's requirements that all parents work collaboratively with MNE towards the goal of family reunification, that all parents understand that students must go home for scheduled school closings and work with staff to make that possible, and that all parents meet with MNE staff approximately 30 days after enrollment to begin planning for home visits.³ On February 25, 2014, the Agawam Public Schools (Agawam) convened a Team meeting attended by Parents as well as by representatives from Agawam and MNE. Parents subsequently accepted an IEP designating MNE as Student's placement and incorporating the conditions referred to above.
5. The conflicts between MNE and Parents that led to the instant hearing request began in or about May 2014, within approximately one month of Student's placement, with difficulties scheduling the 30-day meeting. In a letter dated June 27, 2014 Parents rejected the portion of the previously-accepted IEP that discussed the meeting and home visitation components of the MNE program. From that time forward, the parties' dispute

² Pica is the ingestion of non-food substances.

³ Such planning includes review of the student's progress on IEP goals, an assessment of the home situation for safety factors, and parent training.

has centered around MNE's programmatic requirement for parental collaboration in planning home visits.

6. MNE asserts that Parents knew of the home visitation requirement prior to Student's enrollment, knew also of MNE's requirement that students return home during vacation periods when the school is closed, knew that parents are required to attend a meeting thirty days after placement to begin planning for students' home visits, and that and agreed to these terms in writing (including in the accepted IEP placing Student at MNE). MNE further asserts that while family reunification must be a goal for all students, implementation of this goal is gradual, supported, and highly individualized. The timing and duration of home visits, for example, depends on each individual student's progress towards his or her IEP goals (especially those pertaining to safety) coupled with the family's ability to implement strategies learned during parent training sessions. Initial home visits may be very short, and MNE staff may accompany students on visits where necessary or appropriate.

7. According to MNE, Parents failed or refused to cooperate with the process of planning for home visits, including by refusing to make themselves available for a mandatory meeting 30 days after Student's enrollment. Additionally, MNE contends that Parents have failed to participate in mandatory parent training meetings, have extended visits with Student beyond the required evening departure time, and interfered with staff members' duties by communicating with them directly during working hours rather than following the established chain of communication.

8. Parents, on the other hand, state that MNE has insisted upon forcing a visitation and reunification plan that is premature, because Student's bolting behavior has not yet been eliminated. Parents believe that MNE is unilaterally imposing a policy of home visits that does not adequately ensure Student's safety. Parents claim that prior to Student's enrollment, MNE had assured them that visits might not take place for a year, but then began pushing the family to plan for visits almost immediately after Student began the MNE placement. Parents also contend that MNE's other complaints about their conduct (e.g., regarding meeting attendance and timing of their visits to Student at MNE) are exaggerated. Parents claim that in fact, MNE has been unreasonably rigid in scheduling meetings. Parents state that a home visit was scheduled for November 2014, but MNE cancelled the visit.

9. In a letter dated December 1, 2014 MNE requested that Agawam convene a Team meeting to initiate a "planned termination" of Student's placement. The date of such termination, initially set for January 18, 2015, has been extended by MNE during the course of these proceedings. Student's attendance at MNE has continued without interruption. There is no dispute that Student has been making effective progress at MNE.

10. Meanwhile, in response to the deteriorating relationship between MNE and Parents which culminated in the notice of planned termination, Agawam has made or attempted to make referrals to multiple DESE-approved residential educational programs.

11. As of the dates of the motion hearing in this matter, Agawam had sent referral packets to the following residential schools: NECC, Evergreen, May Center-Randolph, Crystal Springs, and Hillcrest Educational Centers. Student has been accepted only at Crystal Springs and Hillcrest. Parents assert that neither of these two placements is comparable to MNE.
12. MNE is a DESE-approved residential school serving students diagnosed with ASD. MNE generally serves students with more severe manifestations of ASD. MNE offers a high staff –to-student ratio at MNE. Some students, including Student, also have a 1:1 assistant funded by the sending school district. MNE has an Executive Director and Clinical Director who are BCBA’s. The Clinical Director also has a doctoral degree.
13. According to the testimony and affidavits of MNE’s Executive Director, Rita Gardner as well as other documents submitted by MNE, MNE’s program is based entirely on peer-reviewed literature. MNE employs only research-based methodologies (i.e., Applied Behavioral Analysis or ABA) to address students’ needs in academic, behavioral and communication domains. Approaches and interventions for each student are highly individualized to his or her needs and driven by data gathered on each student.
14. Notwithstanding this individualization of instruction, MNE has a core principle of family reunification,. To this end, MNE works with students to teach them to generalize skills and strategies from school to community and requires families to be integrally involved in students’ programming. Families are expected to meet continually with MNE staff, observe staff working with their children in the school setting. Parents are required to participate in MNE-provided training in how to work with their children and/or modify their homes to support children’s ability to safely visit home and potentially move to their homes or another less restrictive setting once they have completed the MNE program. As a condition of their children’s enrollment in MNE, parents must execute various written agreements to collaborate with MNE in preparing students for visits home and eventual movement to less restrictive settings.
15. Testimony was presented by Dr. Frank Robbins and Dr. James Luiselli regarding Student’s programmatic needs. Father testified as to perceived differences between MNE and other proposed programs.

DISCUSSION

The “stay put” rule is a fundamental component of the procedural protections afforded parents and students by the IDEA and the Massachusetts special education statute, G.L. c. 71B. “Stay put” means that during the time that parent and school district are engaged in the IDEA dispute resolution process, “unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child...” 20 U.S.C. Sec 1415(j); 34 CFR Sec. 300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*, 207 F.3d 1, 10 (1st Cir. 1999); *M.R. and J.R. v. Ridley School District*, 744 F.3d 112 (3d

Cir. 2014); M.G.L. c. 71B; 603 CMR 28.08(7) . “Stay put” has been described as “an automatic preliminary injunction.” *Drinker v. Colonial School District*, 73 F.3d 859, at 864 (3d Cir. 1996), the purpose of which is to protect students from unilateral changes in placement by school districts and to reflect the preference of Congress for maintaining the stability of a disabled child’s placement and minimizing disruption to the child while the parents and school are resolving disputes. *Verhoven, Ridley, supra*. Once a student’s “current educational placement” has been determined, the student is entitled to an order maintaining that placement “without satisfaction of the usual prerequisites to injunctive relief.” *Drinker*, 78 F. 3d at 865.

The critical question is identifying the child’s “then current placement,” because not every alteration in a child’s educational services constitutes a change in such placement. Neither the IDEA nor its implementing regulations define the term “then current placement” or provide an exhaustive list of circumstances that do or do not constitute a change triggering “stay put” protection. *Id.* Neither the First Circuit nor other courts have provided an unequivocal definition of the term. Rather, when courts throughout the country have addressed this issue, they have done so in a highly individualized and fact-intensive way. *Hale ex rel. Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831, 834 (8th Cir. 2002).

There are several general principles that guide most such court decisions, however. First, since the purpose of “stay put” is to preserve the status quo, courts look for the “operative placement” or IEP that is “actually functioning at the time the dispute first arises.” *Drinker*, 78 F.3d at 867. Second, courts inquire whether there is a “fundamental change in...a basic element of the educational program...” *Sherri A.D. v. Kirby*, 975 F. 2d 193, 206 (5th Cir. 1992).

More recent decisions in other circuits have elaborated on this standard to emphasize the impact on the student. For example, in *AW v. Fairfax County School Board*, 41 IDELR 119 (4th Cir. 2004), the Fourth Circuit reviewed several “stay put” decisions and noted that important factors to be considered in deciding whether a change (in location, in that case) is a true “change in placement” are whether the change impacts FAPE by “diluting” the quality of services or increasing the restrictiveness of the student’s program. The 8th Circuit decided similarly in *Hale v. Poplar Bluff R-1 School District, supra*, (Court found that providing identical services in a different setting constituted a change in placement under the facts of that particular case because of the impact of the change.)

The issue becomes more complex where, as in this case, a private special education school seeks to terminate the placement of a publicly-funded placement pursuant to applicable state regulations. As stated in the Parents’ *Memorandum* in support of the instant *Motion*, the few BSEA cases addressing the issue of whether a proposed change from one private school to another have generally fallen into two categories: “school specific” cases where the hearing officer determined that “stay put” applied to a particular approved private school, and “comparability” cases, where “stay put” requirements could be fulfilled by providing the student with services that were

“comparable” to those he or she had been receiving, albeit in a different location. School-specific cases include Northampton Public Schools & Lolani, BSEA No. 04-0359 (Byrne, 2003); Falmouth, the Cotting School & Susan S., BSEA No. 05-1581 (Sherwood, 2005), and Quincy Public Schools, BSEA No. 1307468 (Crane, 2013). In each of these cases, the hearing officer determined that the private schools at issue constituted the student’s “stay put” placement. In both *Lolani* and *Falmouth*, the hearing officer directed the private school not to terminate the publicly funded student’s placement, determining that the federal “stay put” provision trumped the state regulation allowing for “planned terminations” by approved private schools. (Such directive was not necessary in Quincy because the private school was not attempting to terminate the student’s placement). Comparability cases include *Newton Public Schools*, *Southbridge Public Schools*, and *NECC*, BSEA No. 1306409 and 12306464 (Crane, 2013) and *Georgetown Public schools and Landmark School*, BSEA No. 1408733 (Oliver, 2014).⁴

A review of the circumstances in the instant case in light of the purposes of “stay put” warrants a conclusion that this is a situation to be treated like the *Lolani* case, such that Student’s “stay put” placement is MNE. My conclusion is based on the fundamental purpose of “stay put” as discussed in the above-cited cases, which is to ensure stability for the student regardless of conflicts between and among the adults. If one steps back from the reams of affidavits, pleadings, and documents, what emerges here is a picture of a young boy with a complex, pervasive constellation of disabilities who is making progress in a highly specialized educational program. According to testimony and documentation submitted by MNE, Student is one of the “easier” students to work with at MNE, and has been deriving educational benefit from the services provided. Student is doing well despite a very difficult relationship between Parents and MNE staff, and despite Agawam being in the unenviable position of attempting constant damage control.

This is precisely the type of situation contemplated by the “stay put” mandate. Student’s needs are intense, pervasive and complex. He is functioning well in his current setting despite the storm of controversy surrounding him. There is no emergency involving the Student. While MNE and Agawam argue that the Parents have reneged on promises they made as conditions of Student’s enrollment, the case is distinguishable from *Landmark* because unlike that case (1) there has been no misconduct by the Student and (2) the parties in *Landmark* had executed a settlement agreement under which the parents waived numerous rights.

⁴ A recent ruling by BSEA hearing officers Reichbach and Putney-Yaceshyn does not fit precisely in either category. In this case, a private school operated a program serving two students within a public school building, under contract with the public school district. The private vendor sought to terminate the contract because of difficulties in the relationship with the students’ parents. The ruling declined to order the private school to continue providing services, but ordered the public school to duplicate those services by other means in the same location. The ruling states that the private school was not a placement in these circumstances, but, rather, a vendor of staff services. The ruling does not preclude ordering a private school to refrain from terminating a student in a situation where the student is actually attending the school. *In re Harrison & Isabella*, BSEA Nos. 1504277 (Reichbach & Putney-Yaceshyn, 2015)

Here, in contrast to the Landmark case, Student was placed pursuant to an IEP, issued in compliance with a BSEA *Decision*. The law entitles him to stability while the parties determine the FAPE issues underlying the hearing request.

At this juncture, it is necessary to address whether “stay put” could be satisfied by moving Student to another residential program. It is clear even from the limited evidence provided at hearing that Student might very well make effective progress in a different residential school. In light of the complexity of Student’s needs, however, this issue should be determined after a hearing on the merits or agreement by the parties. This is a case where the very fact of a move to a different—even if similar—residential placement would be likely to “have a significant effect on [Student’s] learning experience.” *DeLeon v. Susquehanna County School District*, 747 F.2d 149, 144 (3d Cir. 1984). See also *Hale, supra*.⁵

I am aware that state regulations at 603 CMR 28.09(12) prohibit private schools from terminating placements of publicly funded students without prior notice to sending school districts. A second regulation, 603 CMR 18(7)(c), provides for a “planned” termination process to be used in non-emergency situations. The regulations appear to contemplate the right of private special education programs to terminate publicly funded students and the responsibility of sending school districts to provide new placements for such students. I do not interpret this regulation as immunizing private schools from federal “stay put” requirements, however. *Lolani, supra*.

Finally, it is clear from the record that the relationship between MNE and Parents is troubled. Each party clearly feels justified in its respective position. That said, the record strongly suggests that a collaborative working relationship between MNE and Parents as well as a shared goal of a less restrictive environment for Student are necessary for Student to achieve FAPE at MNE. It is certainly possible that the absence such a collaborative relationship could lead to a conclusion, after a hearing on the merits that he needs to be placed elsewhere. In that vein, Parents are urged to cooperate fully with Agawam’s efforts to explore alternative placements, and are reminded that they have agreed to hold Agawam harmless for implementation of the previous *Decision*.

Parents also filed a *Motion to Enjoin MNE from Terminating Student’s Placement*. In this Motion, Parents requested an order prohibiting MNE from terminating Student’s placement in the event that “stay put” was found to be a placement other than MNE. This request for injunctive relief is rendered moot by my ruling on the “stay put” motion and, therefore, is DENIED. Additionally, Parents’ most recent *Motion* to submit additional exhibits is DENIED.

⁵Upon consideration of the evidence submitted by the parties regarding alternative placements, I am setting aside any determination on this issue for a hearing on the merits. Consistent with this ruling I have determined that Student’s “stay put” placement is MNE. Given Student’s particular circumstances, the very fact of a move to a different school, even if similar to MNE or ultimately appropriate, would constitute a major disruption in his educational program.

CONCLUSION AND ORDER

For the reasons stated herein, Student's placement pending appeal is MNE. The Parents' *Motion to Enjoin MNE from Terminating Student's Enrollment* is DENIED as moot. The Parents' *Motion* to submit additional documents for this proceeding is DENIED. The parties will be contacted to provide dates for a hearing on the merits.

By the Hearing Officer:

Sara Berman

Dated: April 28, 2015